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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 664
No. 767

MANUEL RODRIGUEZ TRADING CORPORATION AND MANUEL RODRIGUEZ,

Petitioners,

v.

THE UNITED STATES OF AMERICA

REPLY TO BRIEF AND CROSS-PETITION ON BEHALF OF THE UNITED STATES

PAUL D. PAGE, JR.,
Washington Building,
Washington 5, D. C.

February, 1958.

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I

Before replying (as shortly as possible) to respondent's brief in opposition, we point out that in its conditional cross-petition our big government untruthfully charges two small (but reputable) citizens, General Ralph Immell of Madison, Wisconsin, and Homer C. Clay, Esq. of Chevy Chase, Maryland, with having been expressly found guilty by the Court of Claims of making deliberately false representations in accordance with a preconceived design to circumvent the law. This, to say the least, irresponsible statement is disproved by the record, and should be struck from the files of this Court.[1]

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[1] On page 19, the cross-petition lists a number of statements made by General Immell and Mr. Clay, and alleges that "the Court of Claims expressly found that each and every one of these representations was delib-

The brief in opposition does not (as it cannot) deny that the Court below has in this case decided an important question of federal law which has not been, but should be, settled by this Court. Our first ground for certiorari thus stands unchallenged.

The brief in opposition does not (as it cannot) deny that *if* the affirmative judgment against petitioner is without evidentiary support and based upon testimony and exhibits not admitted as evidence, the Court below in making the finding of fact and entering judgment so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Respondent contends (p. 10) that fact-finding and judgment "are fully supported by competent evidence". The "evidence" to which respondent refers (and to which we referred in our petition) consists of testimony by James L. Pimper, Esq. and two exhibits (Def's. Exs. 100 and 101), which the Court below admitted in evidence, and proffered testimony by Messrs. Fetsko, Langley, and Hutchinson with defendant's exhibits 95, 96 and 102 (for identification), which testimony and exhibits the Court below *refused to admit in evidence*. Momentary inspection of the Pimper testimony and exhibits Nos. 100 and 101 clearly shows that this evidence does not support Finding of Fact 32 or the $49,852.01 judgment against petitioners based on that finding. Similar inspection of the Fetsko-Langley-Hutchison "testimony" and exhibits Nos. 95, 96 and 102 (for identification) *all of which the Court below excluded from the evidence in this case* (see especially Tr. 201, 249, 251, and

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erately false and was made in accordance with a preconceived design to circumvent the law". The Court below did find that General Immel and Mr. Clay made the statements. It did *not* find that the statements they made were false (deliberately or otherwise), much less that they were made in accordance with any design to circumvent the law. (See Defendant's Exhibit 59, F.F. 30, and p. 49 in the cross-petition which respondent cites to support its statements—as it does not.)

254) proves beyond question that Finding of Fact 32 and the judgment against petitioners were squarely based on the testimony and exhibits which *respondent offered* but the *Court below refused to accept* in evidence. Amazingly, respondent contends that after excluding this proffered testimony and statistical data, and *closing the record*, the Court below reversed itself, and admitted the rejected items as evidence *without notice to petitioners*. Had this been done, and respondent can point to no order doing it, such action by the court below, deliberately "mouse-trapping" petitioners into closing their proof with the court's assurance that the Fetsko-Langley-Hutchison testimony, and exhibits 95, 96, and 102 were not in evidence against them, would constitute an example even more flagrant (if possible) of such departure from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision. Our second ground for certiorari is clearly sound.[2]

The foregoing demonstrates that to the limited extent it replies to our petition, the opposing brief is without sub-

[2] We here call the Court's attention to another unfounded charge and misstatement of fact by the defendant. At the bottom of page 10 of its brief respondent (anxious as always to vilify petitioners) states that "the 'agreement' for the sale of the *Sugarland* did not provide for payment of repairs to that vessel because, as a result of petitioner's deliberate misrepresentations, the Maritime Commission was innocently dealing with him as a citizen-purchaser". As a matter of fact the contract *did* provide for payment of repairs to the SUGARLAND, and the charge for such repairs was computed by the Maritime Commission according to law, and *actually paid*. (Finding of Fact No. 9.) And had evidence been admitted with respect to any greater charge for repairs than the Maritime Commission demanded and petitioners paid, it would have been incontestably proved that the computation was made by Maritime *after Maritime had approved petitioner's sale of the ships to Argentina*. When the Maritime Commission computed and collected from petitioner the unrecouped cost of repairs to SUGARLAND, it was *not* "innocently dealing with him as a citizen-purchaser • • • as a result of petitioner's deliberate misrepresentations" but was dealing with petitioner *after giving petitioner the right to sell* SUGARLAND *foreign*.

stance. We now turn to the smoke screen set up by that brief and the conditional cross-petition. Since this Court surely will not permit its attitude or action to be influenced by adjectives and name-calling, we pass that phase, although it bulks large in both papers. As nearly as we can judge, respondent seeks to convince the Court that notwithstanding respondent's calculated refusal to defend the opinion of the Court below or to deny the importance of the question, the Court should not grant certiorari because (respondent claims) (1) petitioners have made a heavy profit on the transaction even after losing their claims and suffering judgment against them in the amount of $49,852.01 in the court below, (2) the ships bought by petitioners from respondent for approximately two million dollars were actually worth more than double that amount; and (3) the Court below erred in not rendering judgment against petitioners for a sum greater than $49,852.01.

Taking the last contention first, it is clear that petitioners, who according to the finding of even the Court of Claims have broken no law and have not been guilty of fraud, are not liable to respondent for damages *in any amount*. Detailed reply would constitute a brief *not* on the merits of the decision which we ask this Court to review, but on the merits of a decision *no Court has made*, and we are confident the Court does not require such a brief from petitioners at this time. Upon hearing on the merits, we will be happy to meet this specious argument and all others respondent may submit in an attempt to draw the Court's attention from the obvious demerits of the decision of the Court of Claims. We submit that this Court should not look with favor upon respondent's proposal to *let bad law stand* in consideration of being permitted to strip petitioners of some $200,000.00.

The short answer to respondent's contention (1) which is in effect that petitioners can pay the judgment of $49,852.01

and still make a profit is (in addition to its complete irrelevance) that the Court of Claims has not found, and not the writer, counsel for respondent, or this Court can possibly know if petitioners made or lost money on the transactions involved. In footnote 3, page 6 of its brief, respondent (characteristically referring to it as "the fruits of his wrongdoing") contends that petitioner is left with a profit "even after satisfying the Government's judgment of $49,852.01". *There is nothing in the record which supports this statement.* Respondent would account for "some $35,000" of it by saying that it was "presumably" retained.[3] So much for that $35,000.00 item. The balance respondent does not condescend to explain in its brief, but reference to page 26 of the conditional cross-petition shows that it is based on Finding of Fact 24, which states that "plaintiff corporation made a *gross profit* on the acquisition and transfer of the two tankers of $153,959.29" (emphasis supplied). It is surely not necessary to say to this Court that a corporation may make a "gross profit" of much more than $153,959.29, and actually *lose money.*[4] We are all bound by the record, and it does not support respondent's contention.

With respect to respondent's irrelevant contention (footnote 5, brief page 9) that the Court below found that the

[3] The Court below did *not* so find.

[4] With respect to "gross profit" W. A. Paton's Accountants' Handbook", 3rd ed. (The Ronald Press Company, 1943) the recognized authority, says:

> It is fairly common to find merchandise, or manufacturing cost of sales displayed as a separate section of the statement and deducted to yield "gross profit". Except for purposes of internal control such *"gross profit" has little significance.* The term is misleading to the layman, and if such an intermediate balance is to be shown, it should be given a more appropriate label, such as "gross margin". As Hatfield (Accounting) says, "the difference between these two [the price paid for merchandise and the price for which it is sold] *is in no sense profit* as only part of the expenses are deducted from the sales" (emphasis supplied).

two ships had a value of more than four million dollars in 1947, it simply is not true. The Court found (Finding of Fact 33, Pet. App. A-11) that it would have *cost* $4,080,287.40 to replace them in 1947 when no sane man would have replaced them (see Def. Ex. 59). And depreciated replacement cost (the figure respondent utilizes for these old ships is not even depreciated) is not even *evidence* of value, where, as here, no ordinarily prudent business man would have built them in 1947 at that cost as an investment. (*Sands Products Corporation* v. *United States*, 131 C. Cls. 147, 149; *Ericsson Line, Inc., etc.* v. *United States*, 134 C. Cls. 766). *Neither the Court of Claims nor its Commissioner made any finding valuing these ships*, for which petitioner has been forced to pay respondent $164,199.60 *more* than the maximum price authorized by applicable law.

Conclusion

Petitioners have shown this Court that there are sound and compelling reasons to grant certiorari in this case, which constitutes a gross miscarriage of justice and lays down broad and destructive precedents at variance with well established law, and that the Court of Claims herein has so prejudicially departed from accepted and usual judicial procedure as to call for correction by this Court. Respondent has been unable to rebut the reasons for granting the writ, and is not only unable but unwilling to defend the opinion of the court below.

Upon the merits, petitioners will undertake to show that failure to reverse the Court of Claims will unjustifiably enrich the Government at the expense of one of its citizens by more than $200,000.00, and that when the Maritime Commission first sold, and months later permitted these ships to "go foreign" (both actions being in conformity with applicable law) it acted in the best interest of the Gov-

ernment in general and the American Merchant Marine in particular.[5]

It is respectfully submitted that for the reasons heretofore stated, and in order for these petitioners to be relieved of an unjust judgment and recover money wrongfully exacted and to the return of which they are justly entitled, the writ of certiorari for which they pray should be granted.

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[5] These ships were not assets but liabilities to the American Merchant Marine. They are so small (4,189 d.w.t.), so slow (10 knots), and of such puny carrying capacity (31,000 bbls.) that Maritime Commission members knew and said that there was no place for them in our American-flag operations, and refused to contemplate that "any sane American" would buy "these things" and seek to operate them (Def. Ex. 59).